

DEPARTMENT OF LABOR (RIN 1210-AB44)
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CENTERS FOR MEDICARE & MEDICAID SERVICES
DEPARTMENT OF HEALTH AND HUMAN SERVICES
ATTN: CMS-9992-IFC2
P.O. BOX 8010
BALTIMORE, MD 21244-8010
RE: INTERIM FINAL RULES ON PREVENTIVE SERVICES
FILE CODE CMS-9992-IFC2

COMMENT TO THE DEPARTMENT OF LABOR (RIN 1210-AB44)
&
THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES
ON INTERIM FINAL RULES ON PREVENTIVE SERVICES (FILE CODE CMS-9992-IFC2)

BY PROFESSOR WILLIAM WAGNER¹

The United States Department of Health and Human Services should rescind the government mandate here because it: 1) substantially interferes with a citizens free exercise of religious conscience protected under the First Amendment to the United States Constitution, and 2) violates the Religious Freedom Restoration Act.

Freedom of Conscience

Ratified in 1791, the Free Exercise Clause of First Amendment to the United States Constitution limits government actions substantially interfering with a citizen's free exercise of religious conscience. In *Sherbert v Verner*, the Supreme Court struck down government action denying unemployment benefits to person who lost her job when she did not work on her Sabbath.² Similarly, in *Wisconsin v. Yoder*, the Court overturned convictions for violations of state compulsory school attendance laws that conflicted with defendants' sincerely held religious beliefs.³

Because the Supreme Court considers the free exercise of religious conscience fundamental, it requires government to provide, for example, a compelling interest to

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² *Sherbert v Verner* (1963) 374 US 398

³ *Wisconsin v Yoder* (1972) 406 US 205

justify interfering with an individual's free exercise of religion. The Court, while applying this strict scrutiny to government action, further requires the government to show it used the least restrictive means available to accomplish its interest. Thus, the fundamental right to the free exercise of religious conscience stands as an inviolable limit on government action. When the Supreme Court attempted to judicially impose a narrower scope on this unalienable, fundamental liberty, Congress and the President strongly responded. In *Employment Division v. Smith* the Supreme Court characterized a government action before it as a neutral law of general applicability – and therefore required no justification by the government for the action even though it interfered with the exercise of religious conscience.⁴ The Court concluded that in such situations government action is constitutional if rationally related to a legitimate government interest.⁵ In response to the *Smith* decision, Congress and the President, in a bi-partisan way, enacted the Religious Freedom Restoration Act. The act expressly provided that:

Government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, [unless] ... it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.⁶

In promulgating the RFRA, Congress declared: “the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution.” Congress stated the purpose of the legislation was

(1) to restore the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder*, and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.⁷

Here, in connection with matters concerning contraceptive services and sterilizations, the U.S. Department of Health and Human Services mandate coerces many American Citizens to act against their sincerely held religious conscience. Because the government action forces these citizens to act against their sincerely held religious conscience, the

⁴ *Employment Division, Department Of Human Resources of Oregon v Smith* (1990) 494 US 872

⁵ Compare, *Church of Lukumi Babalu Aye v Hialeah* (1993) 508 US 520 (holding that Court should apply strict scrutiny to a law substantially infringing upon religious liberty when the law is not a neutral law of general applicability)

⁶ RFRA § 2000bb-1

⁷ The Supreme Court reviewed Congress' exercise of its power after the passage of RFRA. In *City of Boerne v Flores* (1997), the Court held that Congress acted outside the scope of its constitutional authority when enacting the RFRA as applied to the states; In *Gonzales v O Centro Espirita A Beneficente Uniao Do* (2006), it upheld the RFRA requirements as applied to federal government actions.

action substantially interferes with their fundamental liberty interests protected under the First Amendment and the Religious Freedom Restoration Act.

Moreover, the narrow conscience exemption provided in the law for *religious employers* utterly fails to protect the conscience of many American citizens because it intentionally excludes many religious and non religious charitable organizations, schools, hospitals, and other institutions from the shield of the exception. Indeed, it instead problematically collides with many state laws protecting the free exercise of conscience.

Implications

Our nation ignores at its peril the self-evident unalienable standard of the First Amendment. When government ignores such a self-evident moral element in the Constitution, it removes any moral point of reference with which to measure whether its action is right or wrong, good or bad, just or unjust. In such an environment, government inevitably institutes its own brand of utilitarian-based policies (like the regulations here) at the expense of individual liberty and the freedom of conscience. With nothing to limit those in power from imposing on the few whatever they deem in the best interest of the many, very bad things happen. Forced sterilization of healthy women, scientific experimentation on African Americans without their consent, and the institution of slavery are just a few examples of what happened when our American government refused to recognize self-evident unalienable liberty as a limit on its utilitarian policy-making.

Thomas Jefferson once noted that, “[t]he natural progress of things is for liberty to yield and government to gain ground.” Both personal and historical experiences tell us Jefferson’s warning rings true. Freedom of conscience is an especially fragile thing. I have held in my hands the ashes of faithful individuals who died because of their conscience. As a diplomat, I also worshiped in a church where hundreds of men, women and children were slaughtered as they sought sanctuary. In addition, I can tell you about an African member of my team, brutally tortured for standing for freedom of conscience and good governance under the rule of law.

The American Government is supposed to protect its citizens’ freedom, not seize it and exercise it for them. Government mandates that substantially interfere with a citizen’s free exercise of religious conscience merely create an illusion of a nation willing to protect fundamental freedoms. Such a course inevitably erodes essential foundations of a free nation. Those who came before us built our constitutional democratic republic upon the foundations of faith, family, and freedom. That foundation crumbles, perhaps intentionally, under coercive government mandates like the one here. Those who exercise government power at the expense of liberty might pause to remember that while structural institutions of free government may stand for a time, the essence for which they stand can eventually cease to exist.

For all these reasons, I urge HHS to rescind its mandate, or in the alternative, to reconsider its definition of religious employer to include real protection any citizen exercising their constitutionally guaranteed free exercise of religious conscience.